

Appeal from a decision of the Deputy State Director, Mineral Resources, Arizona State Office, Bureau of Land Management, affirming two cease and desist Orders dated January 14, 1994, and February 17, 1994, issued by the Assistant District Manager, Division of Mineral Resources, Phoenix District Office, Bureau of Land Management. Contract Nos. 14-20-450-2740, 14-20-450-2741.

Affirmed.

1. Mineral Leases: Generally--Mineral Leases:
Applicability of Subsequent Legislative Enactments

Mineral leases which provide for the applicability of regulations "now or hereafter in force" incorporate future regulations into existing lease terms, even though such regulations may be inconsistent with those in effect at the time the leases were issued, and even though the future regulations may place additional obligations or burdens on a lessee.

2. National Historic Preservation Act: Applicability--
Mining and Reclamation Plan: Generally

The Federal approval of a mining and reclamation plan requires BLM to comply with section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470f (1994), on both Federal and non-Federal lands involved in the project.

3. Endangered Species Act of 1973: Generally: Section 7--
Mining and Reclamation Plan: Discretion to Approve

The BLM may properly delay approval of a mining and reclamation plan until completion of a thorough review of the impact of the proposed mining operation on Federally listed endangered species.

4. Native American Graves Protection and Repatriation Act of 1990: Applicability--Mining and Reclamation Plan: Generally

The approval of a mining and reclamation plan requires that BLM comply with the National Environmental Policy Act of 1969, which requires that BLM consider a variety of statutes and regulations before approval, to include compliance with the Native American Graves Protection and Repatriation Act of 1990.

APPEARANCES: Burton M. Apker, Esq., and Gerrie Apker Kurtz, Esq., Phoenix, Arizona, for ASARCO, Inc.

OPINION BY ADMINISTRATIVE JUDGE TERRY

ASARCO Incorporated (ASARCO) appeals from a July 21, 1994, Decision (Decision) of the Deputy State Director, Mineral Resources, Arizona State Office, Bureau of Land Management (BLM), affirming two cease and desist Orders dated January 14, 1994 (January 14 Order), and February 17, 1994 (February 17 Order), issued by the Assistant District Manager, Division of Mineral Resources, Phoenix District Office, BLM.

The January 14 Order was issued in response to a December 3, 1993, ASARCO letter to the Superintendent, Papago Indian Agency, Bureau of Indian Affairs (BIA), that indicated ASARCO planned to construct a dike and expand the dumping area on the "19 Dump" located on Mining Lease No. 454-3-60 (Contract No. 14-20-450-2741) and the North Dump, located partly on Mining Lease No. 454-3-60 and partly on business leases. The January 14 Order was issued by the Assistant District Manager, Division of Mineral Resources, Phoenix District Office, BLM.

The January 14 Order stated that ASARCO must cease horizontal expansion of the "19 Dump" (including construction of a dike) and the "North Dump" until a mining and reclamation plan for the San Xavier North and South Mines has been approved; that the regulations (43 C.F.R. Subpart 3592 and 25 C.F.R. § 216.7) require that prior to conducting operations on the leases, ASARCO must receive approval from the authorized officer; that ASARCO's "voluntary" mining and reclamation plan ^{1/} did not discuss waste dump expansion, which would have afforded the authorized officer the opportunity to determine whether the proposed action is in compliance with the Endangered Species Act of 1973 (ESA), as amended, the National Historic Preservation Act of 1966 (NHPA), as amended, and the Native American

^{1/} ASARCO uses the term "voluntary" to refer to the plan which it filed, asserting that such a plan is not required by statute or regulation in its case.

Graves Protection and Repatriation Act of 1990 (NAGP); and that ASARCO's voluntary mining and reclamation plan of October 19, 1988, did not describe waste dump sequencing and future expansion in detail.

The February 17 Order was also issued by the Assistant District Manager, Division of Mineral Resources, Phoenix District Office, BLM. The February 17 Order stated that ASARCO must cease horizontal expansion of the San Xavier North Mine Pit and Dump, as well as all other mine pits and dumps which are located on the Indian mining and business leases; that the regulations (43 C.F.R. Subpart 3592 and 25 C.F.R. § 216.7) require that prior to conducting operations on the leases, ASARCO must receive approval from the authorized officer; that ASARCO's voluntary mining and reclamation plan, not yet approved, did not discuss waste dump and pit expansion, which would have afforded the authorized officer the opportunity to determine whether the proposed action is in compliance with the ESA, as amended, the NHPA, and the NAGP; and that ASARCO's voluntary mining and reclamation plan of October 19, 1988, did not describe waste dump sequencing, dump expansion, and pit expansion in detail. In sum, the two Orders directed ASARCO to cease further horizontal expansion of all mine pits and dumps on the Indian leases until a mining and reclamation plan for the San Xavier North and South Mines has been approved.

ASARCO appealed the January 14 Order and the February 17 Order to the Director, Arizona State Office, BLM, on February 2, 1994, and March 2, 1994, respectively. ASARCO's argument before the State Director is set out in the Decision appealed from, in pertinent part, as follows:

ASARCO's argument is, in essence, that the January 14 and February 17, 1994, orders are the latest in a series of attempts by the BLM to impose regulations that are not applicable to their leases; that the 1994 orders are the first time the [ESA], the [NHPA], and the [NAGP] have been cited as a basis for finding Asarco's voluntary (emphasis in Asarco's brief) mining plan to be insufficient; and that the three "newly cited statutes" are not cited in the "Authority" section of 43 CFR Subpart 3590. (At the same time, Asarco argues that 43 CFR Subpart 3590 does not apply to their leases). * * * In other words, that Asarco is not bound by any Federal Regulations that did not exist at the time Asarco entered into the lease agreements in 1959.

(Decision at 6.)

On appeal, the Deputy State Director's findings, as reported in the July 21, 1994, Decision, determined the following:

Based on a review of the January 14, 1994 and the February 17, 1994 orders, 43 CFR Subpart 3590, and Asarco's voluntary mining and reclamation plan of October 19, 1988, and supplement

of June 28, 1989, I have concluded that the Assistant District Manager, Division of Mineral Resources, Phoenix District Office, has followed the correct procedures in this matter.

(Decision at 14.)

In its August 24, 1994, appeal to this Board, and in its supplemental filing on September 26, 1994, ASARCO provided this Board with a Statement of Reasons (SOR) for appeal and a Supplemental Statement of Reasons (Supp. SOR) for appeal, respectively. Appellant's arguments contend, first, that BLM lacks statutory and regulatory authority to require ASARCO to submit mining plans for ASARCO's San Xavier Mining Operation. (Supp. SOR at 1.) This argument arises from BLM's demand that it (ASARCO) gain approval for a mining and reclamation plan pursuant to 43 C.F.R. Subpart 3592 and 25 C.F.R. § 216.7. ASARCO claims that because its leases date from 1959, and because Part 3590 is supplemental to, and governed by 25 C.F.R. § 216, which did not become effective until January 18, 1969, Part 216 and Part 3590 apply only to leases issued subsequent to January 18, 1969, and not to its leases. (SOR at 8.) In any event, ASARCO contends, it did adequately describe its intended expansions at North Dump, 19 Dump, and at the San Xavier North Mine Pit and Dump consistent with Part 216 and Part 3590 such that BLM was provided sufficient information to make determinations under the ESA, the NHPA, and the NAGP. (SOR at 9-18.)

ASARCO claims, however, that none of the three Acts cited by BLM in its two cease and desist Orders (NHPA, ESA, or NAGP) authorize or compel the relief sought by BLM. Appellant urges that BLM lacks the independent power or regulatory authority under the NHPA, 16 U.S.C. § 470 (1994), to require ASARCO to do anything but provide it access to the leased property.

ASARCO explains that pursuant to Executive Order No. 11593, 36 Fed. Reg. 8921 (May 13, 1971), all Federal agencies were to nominate by July 1, 1973, all sites, buildings, districts, or objects under their control or jurisdiction deemed of historical value or significance for listing on the National Register of Historic Places. (Supp. SOR at 8.) Appellant contends that none of the 160 acres leased by ASARCO in 1959 from the San Xavier portion of the Tohono O'odham Reservation and none of the over 2,300 acres of leased allotted lands were nominated by BLM, BIA, the tribe, or the allottees themselves for inclusion on the National Register of Historic Places. *Id.* ASARCO claims that since there have been no discoveries of significant structures since 1973, it is hard to see how BLM could require Appellant some 21 years later to do BLM's oversight job for it through the context of a mining plan. (Supp. SOR at 9.) Finally, ASARCO contends:

The NHPA's provisions do not give federal agencies the authority to force other entities to do the inventory of public lands. It is not lessees like ASARCO, but the "heads of all federal agencies" that must assume responsibility for the preservation of historic properties which are owned or controlled by such agencies.

(Supp. SOR at 9-10.)

With respect to the ESA, 16 U.S.C. § 1531 (1994), Appellant explains that under section 7(a)(2) of the ESA, Federal agencies may take no "action" that would jeopardize the continued existence and recovery in the wild of any listed threatened or endangered species. 16 U.S.C. § 1536(a)(2) (1994). Second, no person (including Federal agencies) may commit a "take" of fish or wildlife that are listed as "endangered." ASARCO claims that neither of these provisions authorizes BLM to regulate mining activities in the absence of some other statutory authority. (Supp. SOR at 3.)

Further, Appellant contends that, under section 7(a)(2) of the ESA, Federal agencies are obligated to "insure that any action authorized, funded or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered * * * or threatened species." 16 U.S.C. § 1536(a)(2) (1994); (Supp. SOR at 4). ASARCO explains that to ensure this jeopardy provision is complied with, Federal agencies are required to review their actions to determine whether any action may affect listed species. 50 C.F.R. § 402.14(a); *Id.* Appellant claims the sole purpose of the section 7(a)(2) review process is to assist "action" agencies in meeting their obligations not to "jeopardize" a listed species through the agency's actions. (Supp. SOR at 5.) In this instance, however, ASARCO claims there is no Federal agency action that would trigger the ESA's review requirement. The BLM, Appellant contends, has no regulatory authority requiring it to review and approve ASARCO's mining plan, and the BLM lacks the authority to compel ASARCO to submit mining plans for review and approval. *Id.*

Likewise, ASARCO claims in this appeal that BLM cannot demand that Appellant include provisions for complying with the NAGP, 25 U.S.C. § 3001 (1994), in its mining and reclamation plans when BLM is under no obligation itself to actively search for as yet undiscovered Native American human remains or funerary articles. (Supp. SOR at 11.) Appellant acknowledges that Federal agencies, as well as entities like ASARCO, who may discover Native American cultural items on Federal or tribal lands, must acknowledge such discoveries to the Secretary of the Interior. *Id.* Appellant nevertheless maintains that where, as here, there have been no discoveries of Native American remains or objects, there is no nexus between ASARCO's duties under its 1959 Mining and Business Leases with respect to Indian Reservation lands and BLM's demands for ASARCO to comply with NAGP. (Supp. SOR at 12.)

[1] Appellant's claim that it is not bound by any Federal Regulations that did not exist at the time ASARCO entered into the lease agreements in 1959 is without merit. This Department has long held that the intent of the language "now or hereafter in force," which is included in section 4(h) of ASARCO's 1959 mining leases, is to incorporate future regulations into existing lease terms, even though such regulations may be inconsistent with those in effect at the time the leases were issued, and even though the future regulations may place additional obligations or burdens on a lessee.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (1990); Veola and Aaron Rasmussen, 109 IBLA 106 (1989); Coastal Oil & Gas Corp., 108 IBLA

62 (1989); Gilbert V. Levin, 64 Interior Dec. 1 (1957). For this reason, BLM was well within its authority to demand an acceptable mining and reclamation plan prior to approving the mine expansion pursuant to 25 U.S.C. § 216.7 (1994) and 43 C.F.R. Subpart 3592.

[2, 3, 4] In the present case, Appellant argues that if the statutes do apply, any obligation for their compliance should fall upon BLM alone. Having addressed Appellant's first claim that the statutes do not apply to the 1959 leases, we turn to the issue of whether the burden of review may be delegated. This Board has previously examined the issue of Federal agency delegation of responsibility for compliance under a Federal statute to the lessee or permittee of the land affected by the statute's requirements. In Old Ben Coal Co. v. Office of Surface Mining Reclamation and Enforcement (OSM), 109 IBLA 362 (1989), the Board stated that the ultimate responsibility for compliance with NHPA lies with the Federal agency, but this does not suggest that the Federal agency is without authority to delegate any of the required duties. Therefore, the Board found that OSM was authorized to require applicants for permits to mine coal to conduct cultural resource studies at their own expense. Id. at 372. Subsequently, in Central Valley Electric Cooperative, Inc., 128 IBLA 126 (1993), we reaffirmed the holding in Old Ben Coal Co., supra, and further explained that BLM could delegate the requirement to prepare archaeological reports in compliance with NHPA provisions and require the permittee to bear the burden of the cost of such reports for both Federal and non-Federal lands. Central Valley Electric Cooperative, Inc., supra, at 128.

The above holdings are equally applicable here. The BLM was well within its authority to require ASARCO to provide an analysis of the possible impacts on endangered species pursuant to the ESA, impacts on cultural resources under the NHPA, and the possible impact on Native American graves pursuant to the NAGP in its mining and reclamation plan. Under each of the three Acts, the planned expansion of the San Xavier operation constitutes an activity or undertaking that required taking into account these cultural, historical, and environmental impacts. See 36 C.F.R. § 800.2(o). 2/

To the extent Appellant has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

2/ The regulation defining "undertaking" for which a review is required under the NHPA states:

"Undertaking means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106."

36 C.F.R. § 800.2(o). The ESA and NAGP have similar provisions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge